INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 578

JOHN WALTER OAKLEY, JR.

v.

LOUISVILLE & NASHVILLE RAILROAD CO.

No. 579

JOHN S. HAYNES

v.

SOUTHERN RAILWAY SYSTEM

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of John Walter Oakley, Jr., and John S. Haynes, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cases on November 22, 1948.

OPINIONS BELOW

The opinion of the district court in *John Walter Oakley, Jr.* v. *Louisville & Nashville Railroad Co.* (OR. 24)[1] is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (OR. 28-31) is reported at 170 F. 2d 1008. The opinion of the district court in *John S. Haynes* v. *Southern Railway System* (HR. 22), is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (HR. 26) has not yet been reported.

JURISDICTION

The judgments of the Court of Appeals in *John Walter Oakley, Jr.* v. *Louisville & Nashville Railroad Co.* (OR. 28) and in *John S. Haynes* v. *Southern Railway System* (HR. 26) were entered on November 22, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the end of the veteran's first year of reemployment terminates all protection, including access to the courts, afforded veterans by Section 8 of the Selective Training and Service Act.

2. Whether the veteran's first year of reemployment can be regarded as terminated before

[1] References to the record in *John Walter Oakley, Jr.*, v. *Louisville & Nashville Railroad Co.* will be indicated by "OR", and in the *John S. Haynes* v. *Southern Railway System*, by "HR".

he has been restored to the position to which he is entitled under Section 8.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended (50 U. S. C. Appendix 308) provide as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
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> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * * *
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> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of

like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any

such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * *

STATEMENT

On February 14, 1947, John S. Haynes, the petitioner in No. 579, instituted an action under Section 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 58 Stat. 798, 50 U. S. C. App. 308 (hereafter referred to as "the Act") in the District Court of the United States for the Eastern District of Kentucky (HR. 1-3).

His complaint set forth the following facts: Prior to his enlistment in the armed forces on February 1, 1942, he had been employed as a machinist helper by the Southern Railroad System at Somerset, Kentucky. Within ninety days after

his discharge from the armed forces, he applied for reemployment with that employer and was reemployed as a machinist helper on November 16, 1945. During the three years that he had been in the armed forces, several openings had occurred in the position of helper apprentice, a higher paid position, for which machinist helpers were eligible on the basis of seniority, and between December, 1942 and February, 1943, six machinist helpers junior to him in seniority had became helper apprentices. On the basis of his relative seniority he, too, would have been promoted no later than February 1943, had he not been serving in the armed forces. Consequently, he claimed to be entitled to reemployment as a helper apprentice with seniority as of February 1943. The complaint prayed for a judgment restoring petitioner to the seniority status he would have had but for his service in the armed forces, determining his right to the position and pay of a helper apprentice, and awarding him the wages he had lost because of the failure of the respondent to make him a helper apprentice on December 16, 1945, upon his reemployment with the company after his return from the armed forces (HR 3).

An answer was filed by the respondent railroad company alleging that plaintiff had been given the "same employment" as he had left. Further, the answer denied that, under the terms of the collective bargaining agreement between the railroad

company and the International Association of Machinists governing the employment relationship between petitioner and respondent, petitioner was entitled to reinstatement as a helper apprentice, since he lacked two years experience as a machinist helper and, in addition, had not taken the various steps necessary for his promotion to the higher position (HR. 7-12).

System Federation No. 21 of the Railroad Employees Department of the American Federation of Labor, the collective bargaining representative which had negotiated the contract set out in the railroad company's answer, was permitted upon its own motion to intervene and file an answer in the proceeding which, in effect, simply denied the allegations of the complaint as to petitioners' right to the position of helper apprentice (HR. 14-21).

John Walter Oakley, Jr., the petitioner in No. 578, instituted an action on April 14, 1947, in the same district court as had Haynes, likewise seeking relief under Section 8 of the Act (OR. 1-3). His complaint alleged: Prior to his induction in the armed forces on May 7, 1944, he had been working as a locomotive machinist for the Louisville and Nashville Railroad Company at Loyall, Kentucky. During his absence, the Loyall shop was transferred to Corbin, Kentucky, and had he not been in the armed forces, he would have been transferred with it and given seniority at Corbin as of that date, July 1, 1945. He was discharged from the armed forces

on May 22, 1946 and within ninety days, applied for reemployment to his previous position or to one of like seniority, status and pay. He was reemployed as a locomotive machinist at Corbin, Kentucky on July 17, 1946 with seniority as of that date, whereas he was entitled to seniority as of July 1, 1945 which was the seniority he would have had but for his service in the armed forces. Because he was denied his proper seniority rating, he was required to work the evening, rather than the day shift, and may even be laid off (OR. 2-3). He asked the court for a judgment declaring his seniority to be from July 1, 1945.

The respondent railroad company filed an answer denying that petitioner was entitled to any seniority other than that which he had been given (OR. 10-12). Simultaneously it requested petitioner to admit certain facts, including the terms of a collective bargaining agreement, relating to the transfer of laid-off employees and seniority, and the existence and terms of a "Memorandum of Understanding Protecting Seniority of Employes Entering Military or Naval Service" entered into between it and the International Association of Machinists through System Federation No. 91, Railroad Employees Department, American Federation of Labor, which provided that a returning veteran should be restored to such position as "his accumulated seniority entitled him * * * the same as if he had remained in the service." (OR. 5-9).

Petitioner made certain of the admissions requested and denied the remainder because of insufficient knowledge as to their truth or falsity (OR. 13-14). Neither the facts admitted or denied are material to this petition.

On May 21, 1947 System Federation No. 91 was permitted to intervene on its own motion and filed an answer denying in substance the allegations of the complaint (OR. 17-23).

On September 2, before evidence had been taken in either of these two cases, the district court on its own motion assigned for argument the question as to whether under the authority of *Trailmobile* v. *Whirls,* 331 U. S. 40, the proceding brought by John Walter Oakley, Jr. against the Louisville and Nashville Railroad Company had been rendered moot (OR. 23). On September 12th, the intervening union filed a formal motion of dismissal in both the *Oakley* and the *Haynes* actions and an order was entered in each case dismissing it on the ground "that the question presented has become moot, because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant." (OR. 24; HR. 21-22).

The Court of Appeals for the Sixth Circuit affirmed both judgments on appeal (OR 28; HR 26). The opinion in the *Oakley* case, which was also the authority for the judgment in the *Haynes* case, (HR. 26), stated that petitioner "was entitled to

restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed." (OR. 30).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred:

1. In holding that the protection within the framework of the seniority system, given a veteran by the Act, including the right to the same position in the employ of the employer whose employ he left in order to enter the armed forces, as is enjoyed by non-veterans with the same or less seniority who remained behind, and which position he would have occupied but for his military service, terminates one year after his reemployment.

2. In holding that the acceptance for one year by a veteran of a position inferior to that to which he is entitled terminates his claim to the protection of the Act and even divests him of an accrued right to wages lost by reason of his employer's violation of that Act.

3. In holding that the decision of this Court in *Trailmobile Co. v. Whirls*, 331 U. S. 40, compelled dismissal of these actions.

4. In affirming the judgment of the district court dismissing these actions.

REASONS FOR GRANTING THE WRIT

I

1. The judgments of the court below in these two cases stand for the following constructions of Section 8 (c) of the Selective Training and Service Act of 1940:

a. that the veteran's right to be restored to his job without loss of seniority is lost by accepting one year of reemployment in any job;

b. that the protection of veteran's seniority rights by Section 8 (c) terminates completely after one year of employment, even as against discrimination in favor of non-veterans;

c. that the expiration of one year of reemployment cuts off a veteran's right to recover in damages the difference in compensation resulting from failure to restore him "without loss of seniority".

The court below based its decision entirely upon this Court's decision in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40. The underlying rationale of the decisions below can only be that "all protection afforded by virtue of Section 8 (c) terminates with the ending of the specified year," a proposition which this Court specifically refused to decide in the *Whirls* case. 331 U. S. at 60. Similarly, this Court stated in *Whirls* that "We expressly reserve decision upon whether the statutory security ex-

tends beyong the one-year period to secure the re-employed veteran against impairment in any respect of equality with such a fellow worker." *Ibid.* It is these questions which were reserved in *Whirls* which the court below has resolved solely on the authority of the *Whirls* decision. On that ground alone, the judgments should be reversed.

2. In both of these cases, judgments were entered dismissing the complaints before trial as moot. In that posture of the cases, the petitioner veterans allege that their seniority entitled them upon return from military service to better jobs than those in which they were reemployed. In computing their seniority, both petitioners count as time on the job their respective periods of military service.[2] Neither petitioner has at any time sought any form of super-seniority over non-veterans. Rather, each alleges that upon returning from military service he was reemployed in a posi-

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[2] Not only is this in accordance with this Court's construction of Section 8 (c) in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, restated with approval in the *Whirls* case, but that construction has been approved by Congress and embodied in Section 9 (c) (2) of the Selective Service Act of 1948 (Public Law 759, 80th Cong.) as follows:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

See Sen. Rep. 1268, 80th Cong., 2d Sess. (1948) 16.

tion which was inferior to that which he would have had if he had remained on the job instead of serving in the armed forces.

Specifically, Oakley, who was reemployed as a locomotive machinist at Corbin, with seniority as of the date of his reemployment, contends that he is entitled to seniority as of July 1, 1945, the date during his absence on which he would have been transferred to Corbin. Oakley asserts that the result of this loss of seniority has been to relegate him to night work and, more important, to put him in a more vulnerable position with respect to layoffs.[3] Haynes, who was reemployed in his previous position of machinist helper, alleges that had he remained on the job he would have been promoted to helper apprentice with higher pay, as were six non-veterans who had less than his seniority at the time he entered the armed forces. Oakley commenced his suit within the first year of reemployment, and Haynes three months after the expiration of that year.

The only application which this Court has given to the one-year clause of Section 8 (c) in relation to seniority rights is the holding of the *Whirls* case that after the first year of reemployment veterans'

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[3] That this concern of Oakley is not merely hypothetical is evidenced by the report in the New York Times for February 13, 1949 that more than 100,000 railway workers, or approximately 10 per cent of the total working force of the industry, are unemployed, and that the furloughing of workers has been especially heavy in the shops and maintenance departments.

seniority rights may be modified by a collective bargaining agreement which does not discriminate against veterans. The issue in the *Whirls* case was the duration of the veteran's "preferred standing over employees, not veterans having identical seniority rights." 331 U. S. at 60. Such preferred standing, this Court held, terminates with the ending of the statutory year. The decisions below go far beyond to hold that the "protection within the framework of the security system" of the veteran's position on the seniority escalator endures for only the first year of reemployment. The obvious and direct result is to make Section 8 (c) a dead letter for most veterans of World War II.

Of course, if Congress had intended such a result, it would have been easy merely to say that each returning veteran should be reemployed at his old job for one year. Instead, Congress provided in detail that "such employer shall restore such person to such position or to a position of like seniority, status, and pay" and that he "shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules" etc. The only possible purpose of these provisions is to provide permanent protection to the veteran's job seniority and status in their practical implications.

It is clear that Congress in framing the legislation conceived of it as protecting the veteran coming from organized industry from being discrim-

inated against at any time after his reemployment because of the time spent in the service, not simply for one year. This appears from the stress placed on the protection given pension and retirement rights. As explained by Senator Sheppard, Chairman of the Senate Military Affairs Committee which drafted the legislation, Section 8 (c), which is the source of the protection afforded the veteran against prejudice to his seniority rights by reason of his absence in the service, was intended "to prevent loss of seniority, accrued employment benefits, including participation in insurance, pension, bonus, and other beneficial programs." 86 Cong. Rec. 10095. Representative May, Chairman of the House Military Affiairs Committee, explained its purpose to be (86 Cong. Rec. 11702):

> * * * to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Clearly, men drafted for a year of service would not be eligible for pensions or retirement until many years after their return to employment. Congress was concerned that when that time came, they should not be placed at a disadvantage, as compared to their colleagues, by reason of their service

in the armed forces. Nothing could more clearly negate an intention to limit the protection given seniority rights to the year of statutory employment.

The construction placed on this Act by the court below, which refused, because a year had elapsed since petitioners were reemployed, to pass upon their claims that they have not been restored to equality within the framework of the seniority system with non-veteran employees comparably situated, completely defeats the purpose of the Act, referred to repeatedly by this Court in both the *Fishgold* and *Whirls* cases, to protect the veteran against being penalized by his service to the nation.[4] In highly organized industries, such as

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[4] *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalised on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284-285).

"He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

Trailmobile Co. v. *Whirls*, 331 U. S. 40:

"The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41).

"That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work

that in which petitioners are employed, seniority rights determine almost every aspect of employment, including promotions, retirement, pension rights, lay-offs, discharges and transfers. If, after the expiration of the statutory year, the veteran cannot appeal to the courts for protection against a refusal to credit the time spent by him in the service toward such rights, he has been permanently and most seriously "penalized by reason of his absence from his civilian job." 328 U. S. at p. 284.

The decisions below hold that petitioners having been reemployed for a year with less than the

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until the date of his reemployment without going into the service" (p. 56).

"The men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58).

"The restored veteran, it was held, could not be disadvantaged by his service to the nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence'" (p. 58).

Dissenting opinion in *Trailmobile* case:

"In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away" (p. 62).

"The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services" (p. 63).

"In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement" (p. 63).

seniority which they claim may not thereafter obtain judicial determination and enforcement of their seniority rights. This means that if a returning veteran accepts a job of lower seniority or other status than he believes he is entitled to under the Act, he must take the risk that unless within the first year of reemployment he obtains recognition of his claim it is gone forever. The incentive thus created for a veteran to draw unemployment benefits until his claim for restoration is finally resolved, instead of taking the offered job in the meantime, is obvious. We do not believe that Congress ever intended such a result. And yet this is the result of converting the one-year limitation in the last clause of Section 8 (c) from a limitation upon the veteran's *preferred* position against discharge, into a general (and short) period of limitation on enforcement of the rights against discrimination conferred by the other provisions of the section.

The necessary implication of the decision is that Section 8 (c) gives no protection to the veteran's seniority rights after the first year of reemployment. Such a conclusion is inconsistent with the legislative concern to protect such rights. It is inconsistent with this Court's construction that the time spent in military service must be counted as time on the job in computing seniority—a construction which Congress has expressly ratified. Yet the court below has necessarily held that after the first year of reemployment (Section 8 (c)) does

not protect the veteran by requiring that such service-acquired seniority be counted in connection with such matters as promotions and layoffs. We think it clear that Section 8 (c) protects indefinitely the veteran's rights within the framework of a seniority system and that this protection extends to the inclusion of service-acquired seniority in the computations of seniority for the purposes of the seniority system.[5] While a veteran's seniority rights may be modified after the first year of reemployment by arrangements which do not discriminate against him, they may not, as alleged here, be simply ignored.

The decision below in the *Haynes* case that upon the expiration of the first year of reemployment the veteran cannot recover from the employer the

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[5] This Court, in *Trailmobile* v. *Whirls*, 331 U. S. 40, has indicated its belief that Congress did not intend to limit to a year the protection given seniority rights:

> "The restored veteran, it was held, could not be disadvantaged by his service to the nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. at 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence.' It is clear, of course, that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment." (p. 58)

Dissenting opinion in *Trailmobile* case:

> "Congress limited the right to have a job to a year. But Congress, having assured a veteran the priority status he would have had had he remained at work, did not take away that status at the end of twelve months." (pp. 62-63)

difference in compensation resulting from failure to restore him to the job to which he was entitled, is even more startling. It is common knowledge that a principal inducement or sanction for compliance with the reemployment provisions of Section 8 has been the potential liability for failure to restore the veteran to the job to which he was entitled. Even assuming with the court below that these restoration rights endure for only the first year of reemployment, it does not follow that the cause of action for the amount of the veteran's financial loss from violation of those rights must be determined within that year, rather than within the applicable period of limitation. To so hold, considering the practicalities of litigation, is to effectively destroy the sanction of damages for violation of Section 8.

II

Petitioners can secure the full relief which they seek only if their right to equality in seniority and status with non-veteran employees is held to last beyond the first year of reemployment. However, even were this right limited to a year, the court below erred in holding that this period ran before there had been compliance with the terms of the Act. The only basis for limiting petitioners' rights to one year is the provision prohibiting discharge "from such position without cause within one year after such restoration." (8(c)) "Such position" is the position the veteran left or one of "like

seniority, status or pay." (8(b)) "Restoration" is to be without loss of seniority and the veteran is to be "considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces" (8(c)). Where the veteran has never been restored to his proper position in accordance with these directions—and the petitioners in this case contend they have not—the restoration contemplated by the Act, which starts the running of the year, has never taken place. Therefore, there is no basis for considering the rights of the petitioners to be exhausted.

Petitioners have asked for restoration in accordance with the requirements of the Act; the record shows only that they have been given employment, which they assert to be inferior to that to which they are entitled under the Act. By accepting this employment while endeavoring to secure restoration in accordance with the terms of the statute, they cannot be deemed to have waived their rights to such restoration. *Troy* v. *Mohawk Shop, Inc.* (M. D. Pa.) 67 F. Supp. 721; *Freeman* v. *Gateway Bakery Co.*, (W. D. Ark.) 68 F. Supp. 383; *Radzicki* v. *Columbia Aircrafts Prod., Inc.*, (D. N. J., 12-10-46); *Covey* v. *Douglas Aircraft Co., Inc.* (S. D. Calif., 10-22-46); *Newman* v. *Hi-Hat Elkhorn Mining Co., Inc.*, (E. D. Ky., 9-4-46); *Laeuger* v. *Todd Pacific Shipyards, Inc.*, (W. D. Wash., 11-30-45).

The petitioner Haynes alleges that he has been given employment in a position carrying a lower

rate of pay than that to which he is entitled. If that is so, his employer is liable to him for the wages he has lost in consequence. Sec. 8(e). *Anderson* v. *Schouweiler,* (Idaho) 63 F. Supp. 802; *Troy* v. *Mohawk Shop Inc., supra; Freeman* v. *Gateway Baking Co., supra.* His retention for a year in such lower paid employment can augment, but not extinguish that liability. Cf. *Feore* v. *North Shore Bus Co.,* 161 F. 2d 552 (C.A. 2).

The court below has held in effect that any employment for a year satisfies the requirements of the Act and extinguishes the employer's liability thereunder. Under any interpretation of the Act, nothing less than proof that the veteran has been restored to the position the Act requires and retained in that position for a year should bar the veteran from relief.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1949.

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